

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY**

**Office of Government Ethics**

**BEGA – Advisory Opinion – *Outside Activities: The Meaning of the Phrase “Devoted Substantially” in DPM § 1807.4***

**NOTICE OF DRAFT ADVISORY OPINION**

The Director of Government Ethics, pursuant to the authority set forth in section 219(a-1)(2) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective February 22, 2014 (D.C. Law 20-75; D.C. Official Code § 1-1162.19(a-1)(2)) (2015 Supp.), hereby gives notice that he intends to issue, on his own initiative, an advisory opinion on the meaning of the phrase “devoted substantially” as it is used in section 1807.4 of the District Personnel Manual. The phrase relates to certain outside activities for which District government employees may be compensated, a topic which he considers to be a general question of law of sufficient public importance concerning a provision of the Code of Conduct over which the Ethics Board has primary jurisdiction.

All persons interested in commenting on this draft Advisory Opinion may do so not later than thirty (30) days after publication of this notice in the *D.C. Register* by sending comments electronically to [bega@dc.gov](mailto:bega@dc.gov) or by filing comments in writing with Brian K. Flowers, General Counsel, Board of Ethics and Government Accountability, 441 4<sup>th</sup> Street, N.W., 830 South, Washington, D.C. 20001.

## **DRAFT ADVISORY OPINION**

### ***Outside Activities: The Meaning of the Phrase “Devoted Substantially” in DPM § 1807.4***

#### **Purpose of this Advisory Opinion**

With some restrictions, District government employees may pursue employment and other activities outside their jobs and be paid for doing so. This opinion is intended to provide interpretive guidance on the phrase “devoted substantially” as it is used in section 1807.4 of the District Personnel Manual (“DPM”).<sup>1</sup> The phrase is central to the restrictions that apply when, in particular, employees engage in outside teaching, writing for publication, consulting, or speaking engagements for compensation or anything of monetary value. Because many of the same considerations apply when employees testify as expert witnesses in litigation in which the District is neither a party nor has a substantial interest, this opinion is intended to encompass that activity as well.

#### **Background**

Several restrictions apply when a District government employee receives compensation for outside teaching, writing for publication, consulting, or speaking engagements. One such restriction is that the subject matter of the activities cannot be “devoted substantially to the responsibilities, programs, or operations of [the employee’s] agency, to his or her official duties or responsibilities, or to information obtained from his or her government employment.”<sup>2</sup>

The “devoted substantially” restriction was first reflected in 1986, in regulations intended, as a whole, to revise “nearly every section” of the DPM.<sup>3</sup> However, neither the preamble to the proposed rulemaking, nor the preamble to the Notice of Final Rulemaking,<sup>4</sup> contained any discussion of the source or meaning of the restriction. Furthermore, the DPM itself, which was substantially revised again in 2014,<sup>5</sup> has remained equally silent.

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<sup>1</sup> The DPM comprises Title 6B of the District of Columbia Municipal Regulations. However, section 3(e) of the Comprehensive Code of Conduct of the District of Columbia Establishment and BEGA Amendment Act of 2015, as introduced on June 12, 2015 (D.C. Bill 21-250), would repeal chapter 18 (employee conduct) of Title 6B. Therefore, readers should note that, if Bill 21-250 becomes law, many of the provisions of chapter 18 would be incorporated into the new Comprehensive Code of Conduct. Consequently, while the citations to the DPM in this opinion would change, the substance of the advice would not.

<sup>2</sup> DPM § 1807.4. For other restrictions on these outside activities, *see* DPM § 1807.2 (activities cannot be prohibited by law, regulation, or agency standards and must be undertaken outside regular working hours, or while employees are on annual leave, compensatory leave, exempt time off, or leave without pay) and DPM § 1807.3 (information used in activities cannot “draw on official data or ideas which have not become part of the body of public information, except nonpublic information that has been made available on request for use in such capacity, or unless the agency head gives written authorization for use on the basis that its use is in the public interest”).

<sup>3</sup> *See* Notice of Proposed Rulemaking, 33 DCR 3874 (June 27, 1986).

<sup>4</sup> *See* 33 DCR 6794 (Oct. 31, 1986).

<sup>5</sup> *See* Notice of Final Rulemaking, 61 DCR 3799 (Apr. 11, 2014).

What is clear is that the restriction in DPM § 1807.4 applies only when District employees are compensated for outside teaching, writing for publication, consulting, or speaking engagements. While other restrictions may apply, depending on the circumstances, when employees undertake those activities *without* compensation – for example, the prohibitions on using government time or resources for other than official business (DPM § 1807.1(b)) or divulging any official government information to any unauthorized person (DPM § 1807.1(f))<sup>6</sup> – the “devoted substantially” restriction in DPM § 1807.4 does not. Moreover, there is nothing in the DPM that addresses providing expert testimony in litigation in which the District is neither a party nor has a substantial interest, whether for compensation or not.

All this said, it becomes all the more important to understand the meaning of the phrase “devoted substantially” in the context of compensated outside teaching, writing for publication, consulting, speaking engagements, and testifying as an expert.

## **Discussion**

### **I. Early Federal Ethics Regulations**

Because certain federal ethics laws have applied to District government employees over the years,<sup>7</sup> the search for the source of the 1986 predecessor to DPM § 1807.4 began with the federal regulations implementing those laws at the time. Focusing on the Civil Service Commission regulations, the most direct reference to the outside activities relevant for purposes of this opinion was found in 5 C.F.R. § 735.203(c), which applied only to a narrow class of Presidential appointees, such as agency heads and full-time members of boards and commissions, but prohibited them from “receiv[ing] compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance the subject matter of which [was] devoted substantially to the responsibilities, programs, or operations of [their] agency, or which [drew] substantially on official data or ideas which [had] not become part of the body of public information.” However, as noted in 2 Op. Off. Legal Counsel 361, 362 (1977), “several [federal] departments, in their own regulations, [had] extended this prohibition to cover all agency employees.”

It is reasonable to conclude that this federal regulatory experience was not lost on District rulemakers in 1986 and that, today, DPM § 1807.4 can be traced back, directly or indirectly, to 5 C.F.R. § 735.203(c). In any event, the more important question is the meaning of the phrase “devoted substantially.” Fortunately, guidance is clear in that regard.

### **II. Federal OGE Guidance**

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<sup>6</sup> See also federal Office of Government Ethics (“OGE”) Informal Advice Letter 10 x 1 (Mar. 19, 2010) (discussing uncompensated teaching, writing, and speaking).

<sup>7</sup> See, e.g., 18 U.S.C. § 208 (financial conflicts of interest); 18 U.S.C. § 209 (compensation for performance of official duties).

The federal OGE had several opportunities to discuss 5 C.F.R. § 735.203(c) and, in Advice Memorandum 85 x 18 (Oct. 28, 1985) (“Memorandum”),<sup>8</sup> directly addressed the phrase “devoted substantially.”<sup>9</sup> The Memorandum was issued to provide guidance on participation in privately sponsored seminars or conferences for compensation and was divided so as to address two groups of individuals – the high-level Presidential appointees to whom 5 C.F.R. § 735.203(c) applied and other lower-level employees.

As for the first group, the Memorandum relied on an opinion in which the Department of Justice (“DOJ”) Office of Legal Counsel interpreted the phrase “devoted substantially to the responsibilities, programs, or operations of his agency” contained in a DOJ supplemental regulation and noted that the phrase had been given a broad meaning as it applied to a top-level employee, encompassing “the general subject matter or sector of the economy or society with which the individual’s agency is concerned, even though the writing does not specifically relate to the functions of the agency.”<sup>10</sup> Accordingly, the Memorandum concluded this part of the guidance by stating that a high-level employee “may not receive compensation or anything of monetary value for teaching or lecturing at seminars, conferences, or private briefings *where the subject matter relates to the area in which [his or her agency works.]*”<sup>11</sup>

On the other hand, the Memorandum drew a distinction with respect to a lower-level employee, concluding as follows:

[He or she] may lecture on a subject within the employee’s inherent expertise based on his or her educational background or experience, *even though the subject matter is related to the activities of the employing agency.* The employee will be prohibited from receiving compensation only when the activity focuses specifically on the agency’s responsibilities, policies, and programs, when the employee may be perceived as conveying the agency’s policies, or when the activity interferes with his or her official duties.<sup>12</sup>

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<sup>8</sup> The federal OGE was established in 1978 to oversee the ethics program in the executive branch of the federal government. *See* 5 U.S.C. app. § 401 *et seq.* The responsibilities of its Director include “interpreting rules and regulations ... governing conflict of interest and ethical problems and the filing of financial statements.” 5 U.S.C. § 402(6).

<sup>9</sup> *See also* OGE Informal Advice Letter 89 x 17 at 1-2 (Sept. 26, 1989) (discussing provisions prohibiting presidential appointee from writing book in personal capacity).

<sup>10</sup> Memorandum at 4 (citing 2 Op. Off. Legal Counsel at 363). The Memorandum also pointed out that the Office of Legal Counsel had “rejected a narrower of the phrase with respect to these [high-level] employees, which would have barred the receipt of compensation only where the article or book related to existing statutory responsibilities and programs of the agency.” *Id.*

<sup>11</sup> *Id.* at 4 (emphasis added).

<sup>12</sup> *Id.* at 6 (emphasis added).

The Memorandum drew the distinction “to permit [lower-level] employees who wish to engage in [outside seminars, conferences, or briefings] to do so in those instances in which the likelihood that official information or position will be used is minimal.”<sup>13</sup> The reasoning underlying the distinction was again borrowed from DOJ:

[A] more liberal policy for lower-level personnel is warranted because they are not usually sought in order to ascertain [DOJ’s] official position on key policy issues. Furthermore, they are not authorized to state that position, so they are not likely to be attractive to an audience because of their affiliation with the Department.<sup>14</sup>

### III. New Federal Ethics Regulations

Several years after the Memorandum, in 1989, the federal OGE was given authority to issue uniform regulations applicable to all agencies within the executive branch, as part of a comprehensive review of the ethics laws then applicable to the three branches of the federal government.<sup>15</sup> In the preamble to the proposed regulations, it was stated that because the “devoted substantially” standard of 5 C.F.R. § 735.203(c) was “appropriate to ensure that public office [was] not used by any employee for private gain, proposed [5 C.F.R.] § 2635.807 would apply to all employees a *similar standard* that prohibit[ed] the receipt of compensation for teaching, speaking or writing where the subject matter *focuses specifically* on the employee’s official duties or on the responsibilities, programs, or operations of the employee’s agency.”<sup>16</sup>

Accordingly, proposed § 2635.807(a)(1)(i)(E) limited in varying degrees the ability of three groups of employees – noncareer employees, special Government employees, and all other employees – to accept compensation for teaching, speaking, and writing based on the subject matter involved. In pertinent part, the proposed regulation provided as follows:

A subject matter focuses specifically on agency responsibilities, programs, or operations if:

(1) In the case of a noncareer employee ..., it deals in significant part with the general subject matter area, industry, or economic sector primarily affected by the programs and

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (citing 2 Op. Off. Legal Counsel at 363 n.3). *See also* 2 Op. Off. Legal Counsel 231 (1978) (finding course taught for compensation by general counsel of Law Enforcement Assistance Administration permissible) (“[B]ecause your course will not concentrate on LEAA-related matters, we do not think it should be deemed to be ‘devoted substantially to the responsibilities, programs, or operations of the Department’ in the specific sense that the regulation was intended to impart.”).

<sup>15</sup> *See* Standards of Ethical Conduct for Employees of the Executive Branch, 56 Fed. Reg. 33,778 (proposed July 23, 1991) (to be codified at 5 C.F.R. pt. 2635).

<sup>16</sup> *Id.* at 33,790 (emphasis added).

operations of his agency;

(2) In the case of a special Government employee, it deals in significant part with particular matters to which he is or has been assigned as a special Government employee; or

(3) In the case of any other employee, it deals in significant part with particular matters to which he is or has been assigned as an employee of the agency, or with any planned or announced policy of the agency, or with any program or operation of the agency.

The preamble stated that the regulation, as proposed, was “consistent in concept” with the standards that had been applied to outside speaking and writing in informal federal OGE advisory opinions, including the Memorandum.<sup>17</sup>

Numerous agencies, organizations, and individuals commented on proposed § 2635.807, and all of them expressed dissatisfaction with the limitations on receiving compensation for outside teaching, speaking, or writing, as those activities related to an employee’s official duties.<sup>18</sup> In response, the federal OGE stated that it was “sensitive to the concerns expressed” and that, in the final regulation, it had “crafted the restrictions on receipt of compensation bearing in mind the competing considerations of, on the one hand, prohibiting the use of public office for private gain and outside activities that conflict with official duties and, on the other hand, avoiding unnecessary restrictions that would impair the recruitment and retention of valued employees.”<sup>19</sup>

This approach was reflected in the final version of § 2635.807(a)(2)(i)(E).<sup>20</sup> In particular, the federal OGE added a Note and a number of examples following § 2635.807(a)(2)(i)(E) to clarify that an employee, other than a noncareer employee, may accept compensation for teaching, speaking, or writing about a matter within his or her general expertise and which relates

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<sup>17</sup> *Id.* The federal OGE reinforced this point in the preamble to the final rulemaking, stating that because “most agencies” had been applying the guidance in the Memorandum, OGE’s purpose “[i]n translating that guidance in § 2635.807,” was to ensure that “application [be] consistent throughout the executive branch.” See 57 Fed. Reg. 35,006, 35,036 (Aug. 7, 1992).

<sup>18</sup> See preamble to final rulemaking, 57 Fed. Reg. at 35,035.

<sup>19</sup> *Id.*; see also *id.* at 35,036 (“OGE believes [§ 2635.807] will withstand scrutiny on [First Amendment free speech] grounds. It does not prohibit any form of expression and, to the extent it may incidentally burden an employee’s ability to teach, speak or write, it serves a legitimate governmental purpose in ensuring that public office is not used for private gain.”). The Tenth Circuit later proved the federal OGE to be prescient, upholding § 2635.807(a) against a First Amendment challenge by an administrative law judge. See *Wolfe v. Barnhart*, 446 F.3d 1096, 1103-09 (10<sup>th</sup> Cir. 2006).

<sup>20</sup> See 57 Fed. Reg. at 35,063. The final regulations became effective on February 3, 1993, and § 2635.807 has been amended several times since.

generally to an agency's activities, as long as it does not deal in significant part with the specific matters to which the employee is or, within the past year, has been assigned, or to any ongoing or announced policy, program, or operation of the agency.<sup>21</sup>

#### IV. The Meaning of "Devoted Substantially" in DPM § 1807.4

Although, as noted above, a number of federal ethics laws apply to District government employees, the regulations implementing those laws do not.<sup>22</sup> Nevertheless, this Office has looked for guidance to the federal regulations and to the federal OGE's interpretation of them when questions about the DPM have arisen. There appears no reason to depart from that practice for purposes of this opinion, especially given the rulemaking history outlined above.

Therefore, in cases involving DPM § 1807.4, the phrase "devoted substantially" means that the subject of the outside teaching, writing for publication, consulting, or speaking *deals in significant part* with (1) any ongoing or announced responsibility, program, or operation of an employee's agency, (2) any of his or her official duties or responsibilities, including any matter to which he or she had been assigned during the previous one-year period, or (3) any information obtained from his or her government employment. Furthermore, this interpretation is intended to apply (and, in the future, will be applied)<sup>23</sup> in a manner consistent with the clarifying Note following 5 C.F.R. § 2635.807(a)(2)(i)(E). In other words, because DPM §§ 1807.2, 1807.3, and 1807.4 do not, when read together, distinguish between groups of employees, the interpretation announced here is intended to apply to all District government employees for purposes of DPM § 1807.4.

#### V. Related Considerations

A number of related considerations should be noted. First, while the DPM contains no such requirement, some agencies may require approval of any compensated outside teaching, writing for publication, consulting, speaking engagements, or expert testimony. For example, the Metropolitan Police Department regulation that "[t]he Chief of Police, or his or her duly authorized designees, shall grant written approval for each outside employment situation"<sup>24</sup> has the force of law, having been implemented as part of regulations adopted by section 2 of the

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<sup>21</sup> See *Wolfe v. Barnhart*, 446 F.3d at 1102 ("[T]he explanatory Note does not set forth an exception to the regulatory language in § 2635.807(a)(2)(i)(E). Rather, the Note clarifies that a career agency employee may receive compensation where the content of his work falls within his agency's general area of responsibility if neither of the specific prohibitions in § 2635.807(a)(2)(i)(E)(1) or (2) apply.").

<sup>22</sup> See, e.g., 5 C.F.R. § 2635.102(a) (defining "agency" to exclude "the Government of the District of Columbia" for purposes of regulations applicable to standards of ethical conduct for employees of federal executive branch).

<sup>23</sup> While several of my prior Advisory Opinions have discussed DPM § 1807.4 or its predecessor provision (former DPM § 1804.5), none of them defined the phrase "devoted substantially." Furthermore, going forward, any substantive inconsistency between those Opinions and this opinion should be resolved in favor of this opinion.

<sup>24</sup> 6A DCMR § 300.9.

Police Officers Outside Employment Act of 1982.<sup>25</sup> Also, by Office Order, “[a]n attorney employed by [the Office of the Attorney General] shall obtain written approval from the Attorney General ... before engaging in any outside employment, whether or not compensated.”<sup>26</sup>

Second, outside teaching, writing for publication, consulting, or speaking activities that involve the use of public office for private gain or that otherwise violate the DPM are improper, even though they may not be prohibited by DPM § 1807.4.<sup>27</sup>

Third, while teaching, writing for publication, and speaking engagements are activities that are fairly readily understood, consulting can mean different things to different people, and the DPM does not define the phrase “consultative activities” as it is used in DPM § 1807.4. Therefore, to lend some meaning for purposes of this opinion, consulting is deemed to involve the provision of services by an employee, including, but not limited to, giving advice and procuring other services. Consulting also involves the use of knowledge or skills generally acquired through specialized or advanced instruction and/or by years of experience in the area or field in which the consulting services are rendered.<sup>28</sup>

Fourth, the term “compensation” also is not defined in the DPM. However, as evidenced by its use in the phrase “compensation or anything of monetary value” in DPM § 1807.4, the term was clearly intended to have a broad meaning. Further guidance is provided by 5 C.F.R.

§ 2635.807(a)(2)(iii), which defines “compensation” for purposes of the analogous federal regulation on outside teaching, speaking, and writing. While equally broad so as to include “any form of consideration, remuneration or income, including royalties,” the federal definition does contain several exceptions (*e.g.*, “[c]opies of books or of publications containing articles, reprints of articles, tapes of speeches, and similar items that provide a record of the teaching, speaking or writing activity”). On the subject of what it means to receive compensation, *see* 5 C.F.R. § 2635.807(a)(2)(iv) (defining “receive”).

Fifth, as noted above, the DPM does not contain any provisions related to employees testifying as expert witnesses in litigation in which the District is neither a party nor has a substantial

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<sup>25</sup> Effective July 24, 1982 (D.C. Law 4-132; 29 DCR 2450). *See also* GO-PER-201.17 (Apr. 16, 2004) (Outside Employment).

<sup>26</sup> Section II.A. of Office Order No. 2006-27 (Aug. 23, 2006).

<sup>27</sup> *See* DPM § 1807.2 (providing, in pertinent part, that “[a] District government employee may receive compensation for engaging in teaching activities, writing for publication, consultative activities, and speaking engagements *that are not prohibited by law, regulation, or agency standards*” (emphasis added)); *see also, e.g.*, federal OGE Advice Memorandum DO-08-006, Part I, at 19-20 (Mar. 6, 2008) (discussing application of misuse of position limitations “even when an employee may otherwise receive compensation for writing a book unrelated to his official duties”).

<sup>28</sup> *Cf.* 5 C.F.R. § 9001.105(c)(3) (supplemental standards of ethical conduct for Federal Housing Finance Agency) (defining “consultative services” to mean, for outside employment purposes, “the provision of personal services by an employee, including the rendering of advice or consultation, which requires advanced knowledge in a field of science or learning customarily acquired by a course of specialized instruction and study in an institution of higher education, hospital, or similar facility”).



interest. However, because many of the same considerations applicable to outside teaching, writing for publication, consulting, and speaking apply to such testimony,<sup>29</sup> this opinion applies to it as well.

Sixth, depending on the circumstances, there may be exceptions that apply for teaching certain courses requiring multiple presentations.<sup>30</sup>

Seventh, notwithstanding the general probation against engaging in any outside activity or interest which permits a District employee, or others, to capitalize on his or her official title or position,<sup>31</sup> there are limits within which an employee's title or position may be used to identify him or her in connection with compensated outside activities.<sup>32</sup>

## VI. Illustrative Examples

The following examples are offered to illustrate the guidance in this opinion:

### *Example 1*

An employee of the Department of Energy & Environment ("DOEE") assisted in drafting DOEE's lead-based paint regulations in 2011. He is assigned to help draft proposed amendments to those regulations following an unrelated project that he expects to complete within two months. The employee has been offered a consulting contract to provide advice to a development company in restructuring its lead-based paint abatement operations.

Answer: The employee should not enter into the consulting contract, even though he is not currently working on DOEE regulations affecting the development company and the consulting contract can be expected to be completed before he begins drafting the proposed lead-based paint regulations. While the consulting contract would not violate DPM § 1807.4, it would create an appearance that the employee had used his official position to obtain the contract and it would create the

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<sup>29</sup> See 5 C.F.R. § 2635.805(c)(2) (authorizing employee to testify as expert witness where "[t]he designated agency ethics official determines that the subject matter of the testimony does not relate to the employee's official duties within the meaning of [5 C.F.R.] § 2635.807(a)(2)(i)"). This provision reflects the federal OGE's response to a comment that the proposed regulation was "overly broad" and that it should be revised "to provide for authorization to serve as an expert witness if the employee's credentials as an expert are unrelated to his or her Government employment." See preamble to final rulemaking, 57 Fed. Reg. at 35,035; see also federal OGE Advice Memorandum DO-07-019 (July 12, 2007) (outlining cases and issues regarding expert witnesses and relevant ethical restrictions).

<sup>30</sup> See 5 C.F.R. § 2635.807(a)(3) (authorizing exceptions for teaching certain courses); see also DPM § 1147.4 (authorizing certain exceptions to rule that employee cannot receive basic pay from more than one position in District government for more than aggregate of forty hours of work in one calendar week, with respect to teaching on part-time or intermittent basis in certain District agencies).

<sup>31</sup> See DPM § 1807.1(e).

<sup>32</sup> See 5 C.F.R. § 2635.807(b); see also, e.g., federal OGE Advice Memorandum DO-08-006, Part I, at 29.

further appearance of using his position for the private gain of the development company.

*Example 2*

The DOEE employee in Example 1 is writing a book for publication about the history of lead-based paint abatement in the United States. The book contains brief references to the establishment and responsibilities of DOEE.

Answer: The employee may receive compensation for writing the book because it deals with the general subject matter area affected by DOEE programs and operations. However, the employee could not receive compensation for writing a book that deals in significant part with specific DOEE lead-based paint abatement programs or operations.

*Example 3*

A Section Chief in the Civil Litigation Division of the Office of the Attorney General has a keen interest in stamp collecting and has spent years developing his own collection as well as studying the field generally. He is asked by an international society of philatelists to speak at a society convention on how to assess the value of American stamps and wishes to know if he can be paid for his appearance at the event.

Answer: Because the subject does not relate to his official duties, the Section Chief may accept compensation for the speaking engagement. Obviously, government time should not be used.

*Example 4*

The Section Chief in Example 3 wants to know if he may accept a waiver of the fee for attending the society convention, in addition to receiving a speaker's fee.

Answer: The Section Chief may accept the attendance fee waiver, as well as other incidents of attendance, such as meals or course materials furnished as part of the convention.<sup>33</sup>

*Example 5*

A professor at the University of the District of Columbia ("UDC") who conducts research into the molecular basis of the development of cancer is asked by a textbook company to contribute a chapter on her work in the field.

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<sup>33</sup> See 5 C.F.R. § 2635.807(a)(2)(iii)(B).

Answer: The professor may not be compensated for writing about the research she conducts at UDC because it would deal in significant part with her official duties. However, the professor could receive compensation for writing a chapter on the molecular basis of cancer development, provided that the chapter conveys scientific knowledge gleaned from the scientific community as a whole. The chapter could contain brief discussions of recent developments in the field, even though some of those developments are derived from UDC research, as long as the information is available to the public.

#### *Example 6*

The professor in Example 5 wants to know if she can talk about her work on Career Night sponsored by her daughter's youth group. She would not receive any compensation for the talk.

Answer: The professor may give the talk, even though it would deal in significant part with her official duties, because she would not be receiving any compensation. However, during the talk, she may not disclose any non-public information.

#### *Example 7*

An attorney with the Office of Labor Relations and Collective Bargaining ("OLRCB") is an acknowledged expert in the field of employee labor relations and participates in collective bargaining negotiations with employee unions and impasse proceedings. The attorney wants to know if he may receive compensation from a private training institute for a series of lectures on the decisions of the Public Employee Relations Board ("PERB") on unfair labor practices.

Answer: The attorney may be compensated for the lectures, provided that they do not contain any significant discussion of either specific labor relations cases handled by the OLRCB or information that is unavailable to the public. PERB decisions on unfair labor practices are not a specific OLRCB program or operation and, therefore, do not relate to the attorney's official duties. However, a PERB employee could not give the same lectures for compensation.

#### *Example 8*

An attorney employed by the Office of Human Rights ("OHR") is asked by UDC to teach a course on discrimination in public accommodations. The attorney wants to know if she may be compensated for teaching the course without violating the dual government income prohibition.

Answer: The attorney may accept compensation for teaching the course because of a specific exception for teaching at UDC found in the DPM. However, she could not accept compensation for teaching an abbreviated version of the course as part of a continuing education program sponsored by the D.C. Bar because the subject matter deals in significant part with the operations or programs of OHR.<sup>34</sup>

#### *Example 9*

A toxicologist in the Forensic Toxicology Department, Office of the Chief Medical Examiner, is asked to return to New Jersey to testify as an expert witness in a case she worked on while a State employee there. The toxicologist would receive a witness fee and be reimbursed for her reasonable expenses.

Answer: The toxicologist may accept the witness fee and reimbursement because the New Jersey case does not relate to her official duties or to information she obtained from her District employment.

#### *Example 10*

Among his other duties, an employee of the Office of Unified Communications (“OUC”) oversees a new management program for District building facilities supporting public safety voice radio technology. He is asked by a party to a Virginia civil action to testify as an expert on public safety voice radio technology.

Answer: The employee cannot serve as an expert witness for at least two principal reasons. First, the employee’s testimony would deal in significant part with one of OUC’s core operations – the management of building facilities supporting public safety voice radio technology. Second, because the management program he oversees is new, it is reasonably likely that information used as part of his testimony would be derived in significant part from his experience with the OUC program itself. A consideration related to the second reason is that the employee’s testimony would create the appearance of his using non-public information for private gain.

#### *Example 11*

The Director of the District Department of Transportation is asked by a local private university to teach a graduate course on current issues in urban transportation. The Director wants to know how his title may be used in the course materials.

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<sup>34</sup> Cf. DPM § 1147.4(i) (authorizing pay for part-time or intermittent employment as instructor, teacher, or professor at UDC).

Answer: The university may include the Director's title, together with other information about his education and previous employment, in course materials setting forth biographical data on all teachers involved in the graduate program. However, the Director's title or position may not be used by the university to promote the course, for example, by featuring his name and title in bold or some other distinctive type in the course materials.

These examples are meant to be illustrative only and certainly are not exhaustive. Moreover, the analysis for determining permissible outside activities is entirely fact-driven, and small details can make a big difference. Accordingly, notwithstanding the guidance provided herein, employees should continue to seek formal safe-harbor advice from this Office when considering engaging in any outside activity that may overlap with or relate to their District government duties.

\_\_\_\_\_/s/\_\_\_\_\_  
DARRIN P. SOBIN  
Director of Government Ethics  
Board of Ethics and Government Accountability